

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 11, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3342

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TOWN OF GENEVA,

PLAINTIFF-RESPONDENT,

V.

ADRIENNE E. COX,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:
JOHN R. RACE, Judge. *Affirmed.*

NETTESHEIM, J. Adrienne E. Cox appeals from a civil forfeiture order for operating a motor vehicle with a prohibited alcohol concentration (PAC). On appeal, Cox challenges the trial court's pretrial ruling denying her motion to dismiss or, in the alternative, to suppress evidence based on her claim that the arresting officer did not have reasonable suspicion to stop her vehicle. We conclude that the facts and circumstances leading to the stop of Cox's

vehicle provided the officer with a reasonable suspicion justifying the stop. Accordingly, we affirm.

FACTS

The facts are undisputed. At approximately 2:08 a.m. on February 17, 1996, Officer Thomas Giovannoni of the Town of Geneva Police Department observed Cox's vehicle traveling westbound in the right lane of the divided Highway 50. The right lane is wide and marked clearly with a fog line on the right and a white center line. In an affidavit,¹ Giovannoni stated that "[Cox's] vehicle would drift, on numerous occasions, toward the center line and adjust back and drift toward the fog line and adjust back. Some of these adjustments were abrupt and all, in combination, gave [Giovannoni] the opinion that [Cox] was either very inattentive, falling asleep or intoxicated." Giovannoni further stated that on two occasions, Cox's vehicle drifted over the center line for no apparent reason as there was "essentially no traffic at this time of night (2:08 A.M.)." In sum, Giovannoni stated that Cox "operated her vehicle in an erratic and unusual manner"

The trial court denied Cox's motion to dismiss or, in the alternative, to suppress evidence stating: "In this particular case Officer Giovannoni obviously expressed what I believe is an articulable suspicion ... that the driver who is deviating in her own lane is either inattentive, falling asleep or intoxicated." Cox pled no contest and the trial court ordered a civil forfeiture for operating a motor vehicle with a PAC. Cox appeals.

¹ An affidavit of Giovannoni's observations was submitted by stipulation to the trial court at the suppression hearing.

DISCUSSION

“In reviewing an order suppressing evidence, this court will uphold a trial court’s findings of fact unless they are against the great weight and clear preponderance of the evidence.” *State v. Richardson*, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). Here, the facts leading to the stop are not in dispute. Therefore, the sole issue on this appeal is whether Giovannoni’s stop of Cox’s vehicle was based upon a reasonable suspicion and thus, constitutionally permissible. This presents a question of law which we review de novo. *See State v. Krier*, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

Before an officer makes an investigatory stop, he or she must possess a reasonable suspicion that the person is committing, or has committed, an offense. *See State v. Jackson*, 147 Wis.2d 824, 833-34, 434 N.W.2d 386, 390 (1989); *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Our supreme court recently addressed the question of what constitutes a basis for reasonable suspicion justifying an investigative stop in *State v. Waldner*, 206 Wis.2d 51, 556 N.W.2d 681 (1996). Both parties rely on *Waldner* in framing their arguments on appeal. We similarly believe that *Waldner* provides the appropriate guidance on this issue.

The defendant in *Waldner* was stopped after an officer observed “[his] unusual driving at a late hour and his dumping of liquid and ice from a plastic cup” *See id.* at 53, 556 N.W.2d at 683. Waldner challenged the investigatory stop because the officer had only an “inchoate ... ‘hunch’” that Waldner was engaged in criminal activity, and because the conduct observed by the officer was not unlawful, there was no basis for the stop. *See id.* at 56, 556 N.W.2d at 684 (quoted source omitted). The court concluded that, given the totality of the circumstances, the officer’s observations “coalesced to form the

basis for a reasonable suspicion grounded in specific, articulable facts and reasonable inferences from those facts.” See *id.* at 53, 556 N.W.2d at 683.

Here, Cox argues that “[t]he ‘totality of the circumstances’ in the instant case did not provide reasonable suspicion for Officer Giovannoni to make a traffic stop.” We disagree. In *Waldner*, the officer encountered Waldner’s vehicle at 12:30 a.m. The officer observed Waldner’s vehicle stop briefly at an intersection where there were no stop signs and then accelerate abruptly. Waldner then pulled over and dumped a mixture of liquid and ice onto the road. See *id.* The court concluded that “these facts, looked at together, formed a reasonable basis for [the officer’s] suspicion that this driver was impaired and very well could have been intoxicated. Any one of these facts, standing alone, might well be insufficient. But that is not the test we apply. We look to the totality of the facts taken together.” *Id.* at 58, 556 N.W.2d at 685.

Here Giovannoni observed Cox’s vehicle driving in an “erratic and unusual” manner at 2:08 a.m. He observed Cox’s vehicle drifting over the fog line numerous times and over the center line twice. Cox’s correction of her vehicle’s direction was characterized as “abrupt.” As the trial court observed, drifting within one’s lane is a “very well-known indication of impairment.” We conclude that Giovannoni’s observations, when viewed in totality, provided him with the basis of reasonable suspicion necessary to justify an investigatory stop.

Cox contends that she “had not violated any traffic regulation; the speed of her vehicle was appropriate; her vehicle was properly equipped and its lights were on, as required.” Giovannoni’s observations do not dispute this. However, as the *Waldner* court observed, “[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can

be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.” *Id.* at 60, 556 N.W.2d at 686. Giovannoni stated that in his opinion, Cox’s driving indicated that “the driver was either very inattentive, falling asleep or intoxicated.” In light of his observations, Giovannoni’s inferences were reasonable. Thus, we reject Cox’s argument that Giovannoni’s “‘opinion’ was a ‘guess’ or a ‘hunch,’ used as an excuse to stop [her] vehicle.”

We conclude that Giovannoni’s observations of Cox’s vehicle being driven in an “erratic and unusual manner” provided him with a reasonable suspicion justifying a temporary stop. Accordingly, we affirm the trial court’s order denying Cox’s motion to dismiss or, in the alternative, to suppress evidence.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

